TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 220.

FRANCIS SHERWOOD MALE, AS TRUSTEE FOR GILBERT W. CHAPIN, APPELLANT,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED AUGUST 6, 1914.

(24,332)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 2, 1915.

1 District Court of the United States for the Southern District of New York.

FRANCIS SHERWOOD MALE, as Trustee for Gilbert W. Chapin, Appellant,
against
THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY et al., Appellees.

To Alexander Gilchrist, Jr., Esq., Clerk United States District Court, Southern District New York:

In the transcript of the record herein to be by you transmitted to the Supreme Court of the United States, you will please incorporate and include the papers following:

1. Subpœna.
2. Bill of Complaint.
3. Notice of Special Appearance by the defendant, The Atchison, Topeka and Santa Fe Railway Company.
4. Notice of motion by The Atchison, Topeka and Santa Fe Railway Company to set aside the subpœna and the service thereof and to dismiss the bill of complaint together with the two affidavits of A. S. H. Bristow, both verified February 17, 1914, thereunto annexed.
5. The affidavit of Howard O. Wood, verified the 26th day of February, 1914.
6. The opinion of the Hon. Henry G. Ward, C. J.
7. The order entered herein dismissing the bill for want of jurisdiction.
8. The petition for leave to appeal herein together with the order allowing such appeal.
9. Complainant-appellant's assignment of errors herein.

2 10. The certificate of the Hon. Henry G. Ward, C. J.
11. The supersedeas bond herein together with the approval thereof.
12. The Citation dated July 6, 1914, to appear at the Supreme Court of the United States, and
13. The certificate of the Clerk of the District Court of the United States for the Southern District of New York.

Dated New York, July 9, 1914.

WOOD, COOKE & SEITZ,
Solicitors for Appellant.
63 *Wall Street, New York City.*

To the appellee The Atchison, Topeka & Santa Fe Railway Company:

Take notice that the foregoing præcipe will be filed with the Clerk of this Court.

Dated July 9, 1914.

WOOD, COOKE & SEITZ,
Solicitors for Appellant.

To Walker D. Hines, Esq., Solicitor for Appellee.

(Endorsed:) Service of a copy of the within Præcipe is hereby admitted. Dated New York, July 10, 1914. Walker D. Hones, Solicitor appearing specially, etc.—U. S. District Court, S. D. of N. Y. Filed Jul- 11, 1914.

3 *Subpœna.*

The President of the United States of America to The Atchison, Topeka and Santa Fe Railway Company, Atchison, Topeka and Santa Fe Railroad Company, Atlantic and Pacific Railroad Compand, and Boston Safe Deposit and Trust Company, Greeting:

You are Hereby Commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by Francis Sherwood Male, as Trustee for Gilbert W. Chapin, and to further do and receive what the said Court shall have considered in this behalf; and this you are not to omit under the penalty on you and each of you of two hundred and fifty dollars ($250).

Witness, Honorable George C. Holt, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 12th day of January in the year one thousand nine hundred and *th* fourteen and of the Independence of the United States of America the one hundred and thirty-eighth.

ALEX. GILCHRIST, Jr., *Clerk.*

Wood, Cooke & Seitz, Esqs., Solicitors for Plaintiff, 63 Wall Street, N. Y. C.

The defendants are required to file their answer or other defense in the above cause in the Clerk's office of this Court, on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken pro confesso.

ALEX. GILCHRIST, Jr., *Clerk.*

[Endorsed:] E 11-43.

4 I hereby certify, That on the 12th day of January, 1914, at the City of New York, in my District, I served the within Subpœna in Equity upon the within-named Defendant The Atchison, Topeka and Santa Fe Railway Company by exhibiting to David L. Gallup as Comptroller of said Co. at No. 5 Nassau St. N. Y. City the within original and at the same time leaving with him a copy thereof, and at the same time and place left with him a copy of Bill of Complaint in this suit.

WM. HENKEL,
United States Marshal, Southern District of New York.

Dated Jan. 13, 1914.

U. S. District Court, S. D. of N. Y. Filed Jan. 13, 1914.

5 *Bill of Complaint.*

District Court of the United States for the Southern District of New York.

In Equity.

FRANCIS SHERWOOD MALE, as Trustee for Gilbert W. Chapin,
Plaintiff,
against
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Atchison, Topeka and Santa Fe Railroad Company, Atlantic and Pacific Railroad Company, and Boston Safe Deposit and Trust Company,
Defendants.

The plaintiff by this, his bill of complaint, respectfully shows to the court:

First. That the defendant, The Atchison, Topeka & Santa Fe Railway Company, hereinafter called the New Atchison Company, is a corporation organized under the Laws of the State of Kansas, in or about the year 1895. That the defendant, Atchison, Topeka & Santa Fe Railroad Company, hereinafter called the Atchison Company, is a corporation organized under an Act of the Legislature of the Territory of Kansas, approved February 11, 1859. That the defendant, Atlantic & Pacific Railroad Company, hereinafter called the Atlantic Company, is a corporation created by an Act of Congress prior to the first day of January, 1872. That the defendant, Boston Safe Deposit & Trust Company, is and at the times hereinafter mentioned was a banking corporation organized under the Laws of the State of Massachusetts. That the plaintiff is a citizen and resident of the State of New York, and an inhabitant and resident of the Southern District thereof.

Second. That in the year 1879 and for a certain period of time prior thereto, the capital stock of the defendant, The Atlantic Company, consisted of 797,603 shares, of which 670,799 shares were owned or wholly controlled by the Atchison Company and the Western Division of the said Atlantic Company, extending from Albuquerque, New Mexico, to a place called The Needles, was constructed by and in the avowed interest of the Atchison Company, and for the purpose of affording said Atchison Company, and the railroads subsidiary to and controlled by it, an outlet toward the Pacific Coast.

Third. That for the purpose of raising money to enable it to construct and equip the said Western Division of the Atlantic Company's railroad, the Atchison Company did cause the Atlantic Company to issue bonds, that is to say, a series of bonds called first mortgage bonds and dated on or about the first day of July, 1880, at the rate of $25,000 per mile of railroad, the principal thereof payable in thirty years, and bearing interest at the rate of six per cent. per annum, payable semi-annually, and secured by a mortgage upon such proposed line of railroad executed to the United States Trust Company of New York, as trustee for the holders of such bonds, the whole issue of such

first mortgage bonds amounting to $16,000,000; also on or about October 1, 1880, certain bonds called income mortgage bonds, amounting in the aggregate to $12,000,000 or thereabouts, payable on the first day of October, 1910, with interest at the rate of six per cent. per annum, payable semi-annually on the first days of April and October in each year, from the net earnings of the Western Division of the Atlantic and Pacific Railroad, one series of such income bonds being registered and of the denominations of $500, $1,000, $5,000 and $10,000 and payable to the defendant, the Boston Safe Deposit & Trust Company or the registered owner, and one series of the denominations of $50, $100, $500 and $1,000 and payable to the Boston Safe Deposit and Trust Company or bearer, and both principal and interest of said income bonds were declared upon the face of each bond to be payable "at the agency of said railroad company in the City of Boston, State of Massachusetts." It was also upon the face of each of said bonds recited and declared that "all said bonds
6 without any preference are entitled to the benefit of an indenture of even date herewith executed by Atlantic and Pacific Railroad Company and the Boston Safe Deposit & Trust Company, as Trustee," and plaintiff attaches to this bill of complaint and makes a part thereof a copy of said indenture (Marked "A"). That the Atchison Company and the Boston Safe Deposit & Trust Company, their agents and representatives did thereupon offer for sale to the public the said first mortgage and income bonds and did sell and dispose of, to innocent purchasers, for cash, a large number of such first mortgage bonds, and nearly the whole issue of income bonds amounting to $12,000,000 or thereabouts, and the proceeds of the sale of said income bonds as well as of the first mortgage bonds were used in the construction and equipment of the Atlantic & Pacific Railroad, which construction and equipment was for the direct and practically the exclusive use, benefit and behoof of the Atchison Company as owner of nearly all the Atlantic Company stock.

Fourth. That for the purpose of furnishing or pretending to furnish an additional security for the payment of said bonds and of inducing the purchase thereof by the public, the Atchison Company, the Atlantic Company and a certain corporation called the St. Louis & San Francisco Railway Company, a corporation practically owned and controlled by the Atchison Company, entered into a certain agreement, dated January 31, 1880, whereby it was agreed that the said Western Division of the Atlantic & Pacific Railroad should be operated in connection with the Atchison Company and the railroads subsidiary to and controlled by it as an uninterrupted and continuous through line of railroad from the Mississippi River to the Pacific Coast, for the full term of the running of such bonds, and it was further agreed that a sum not exceeding 15 per cent. of all the gross earnings of said railroads and each of them upon all business received from or delivered to such Western Division of the Atlantic & Pacific Railroad should be appropriated for that purpose, which said percentage was afterwards on April 15, 1880, by a supplemental agreement between said corporations increased to 25 per cent. of all such gross revenue during the term of thirty years.

Fifth. That on or about October 5, 1886, the Atchison Company

caused the Atlantic Company to issue in the place and stead of the first mortgage bonds aforesaid certain trust bonds to the amount of $18,794,000 dated January 1, 1887, bearing interest at the rate of 4 per cent. per annum, the principal payable on January 1, 1937, which bonds were guaranteed by the Atchison Company and the said St. Louis & San Francisco Railroad Company, for one-half the principal and interest thereof respectively, which bonds were issued to the holders of and upon the surrender of the first mortgage bonds aforesaid and which first mortgage bonds were, under the plan and agreement by which said substitution was made, deposited in trust in the Mercantile Trust Company of New York, as additional security for the payment of the principal and interest of such new bonds and without resort thereto so long as the interest on such new bonds should be paid.

Sixth. That on or about the first day of September, 1887, the Atlantic Company made, executed and delivered to the Mercantile Trust Company of the City of New York, a second mortgage or deed of trust upon the said Western Division, in and by which it conveyed to the said Mercantile Trust Company, as trustee, its whole property, to secure the payment of the principal and interest of bonds known as second mortgage bonds, which bonds at the same time issued amounted to $5,500,000 or thereabouts, all but $403,000 of which were taken by the Atchison Company and the St. Louis & San Francisco Railway Company, as security for or in payment of debts claimed to be due to them from or for advances made by them to the Atlantic Company, which said second mortgage bonds are the same referred to and authorized in the indenture executed by the Atlantic Company and the Boston Safe Deposit and Trust Company hereinbefore mentioned.

Seventh. That on October 15, 1889, the Atchison Company executed and delivered to the Union Trust Company of New York a certain deed of trust or mortgage, known as its general mortgage, to secure two certain classes of bonds authorized to be issued to the amount of about $200,000,000, which mortgage covered the line of railroad of said Atchison Company, in the State of Kansas, as well as all bonds, stocks, leasehold interests, estates and operating contracts belonging to said Atchison Company extending over the entire railroad system of several thousands of miles which it controlled and operated.

7 Eighth. In the month of August, 1893, with the purpose and design, as this plaintiff is informed and verily believes, of cutting off and extinguishing the income bonds aforesaid and of cheating and defrauding such persons as had been induced to purchase the same and who had furnished them money for the construction and equipment of the Atlantic & Pacific Railroad for the benefit of the Atchison Company, the said defendant, the Atchison Company, did induce the Union Trust Company of New York to begin an action in the Circuit Court of the United States for the foreclosure of said $200,000,000 mortgage and obtain the appointment of receivers of said Atchison Company. And the said Union Trust Company did forthwith institute such action and did obtain from the Circuit Court, in the District of Kansas, the appointment of the presi-

dent, general counsel, and one of the directors of said Atchison Company, as receivers. The bill in such agreed suit alleged that "the unity of the property and its integrity as a whole as now held and operated constitutes one of the most important elements of its value, and that to permit its severance will result in ruin and sacrifice of every interest in said property," and the consent order appointing the receivers directed them to continue the operation of said railroad and the system and every part and portion thereof, and to run, manage and operate the said railroad and such other railroads as said railway company controlled or operated under lease, contract, arrangement, or otherwise, and as heretofore run or operated, and which had been or were being operated by or for and in the interest of the said Atchison Company as a part of its system. Among the properties so controlled by and embraced in said Atchison system as stated in the bill was the railroad of said Atlantic Company, but neither that Company nor any of its mortgage trustees or bondholders were made parties to such agreed proceedings, the only parties thereto being the Union Trust Company of New York as complainant, and the said Atchison Company as defendant, and all the pleadings and orders of court being prepared, agreed upon and entered by consent of the parties. Shortly thereafter and in order to secure and maintain the absolute control over the railroad, operations, traffic and earnings of said Western Division of the Atlantic Company, and thus maintain such transcontinental line, the said receivers of the Atchison Company caused suit to be brought in the District Court for the Second Judicial District of the Territory of New Mexico upon the second mortgage bonds issued by said Atlantic Company and held by said Atchison Company, and thereupon obtained from said Court, they representing both sides of such litigation, their own appointment as Receivers of said Atlantic Company, which official position they continued to occupy until the time hereinafter stated, thereby enabling the said Atchison Receivers to dominate the railroad, business and earnings of the Atlantic Company as a part of the system of the Atchison Company and in its interest.

Ninth. That after the appointment of such receivers an agreement was entered into between the holders of nearly all the capital stock of the Atchison Company and nearly all the owners of the bonds thereof for a reorganization of said railroad company and the readjustment of its affairs, and a committee of nine persons was appointed by the stockholders and the owners of bonds to devise a scheme for such reorganization and readjustment, and a plan for the accomplishment of such purpose was reported by said committee and adopted by the stockholders and bond owners about the first of July, 1895. By such plan "it was proposed to foreclose the general mortgage executed by the Atchison Company in 1889 and to vest the properties acquired at the foreclosure sale in a new company and through that means to accomplish the following ends." Such ends were: (1) To reduce fixed charges. (2) To provide capital for further requirements. (3) To liquidate the floating debt. (4) To consolidate the system so far as practicable. (5) To reinstate existing securities upon equitable terms in their order of priority. It was further proposed that all holders of the general mortgage bonds

depositing the same as directed were to receive 75 per cent. at par in 4 per cent. mortgage bonds of the proposed new company, and further provision was made for the payment of such new bonds and all the interest thereon. The unfunded interest on the surrendered general mortgage bonds was also provided for; likewise the second mortgage bonds of the Atchison Company. The plan also provided for the payment by the stockholders of the Atchison Company in cash of a sum equal to $10 per share of their stock, for which payment they were to receive an equivalent amount of preferred stock and common stock in the new company equal in amount to that which they held in the Atchison Company, so as to enable the entire outstanding common stock of the Atchison Company to be exchanged share for share and converted at par into and constitute the entire common stock
8 of the new company, which was to become the owner of all the assets of the Atchison Company; the common stock of the new company being fixed at $102,000,000, exactly equal to the outstanding stock of the Atchison Company in the process of reorganization. Over $100,000,000 of the common stock of the Atchison Company assented to the plan and complied with the conditions under which the change of stock was, according to said plan, to be accomplished, and paid the assessment of $10 a share for use by the committee in paying such debts of the Atchison Company as were necessary to be paid in carrying out the reorganization.

Tenth. That in pursuance of such agreement and as a step in the carrying out of the plan of reorganization such proceedings were afterwards had that the property of said railroad was sold under a decree of the court and purchased by said committee or in their behalf for the sum of $60,000,000, whereupon said committee in pursuance of the reorganization aforesaid caused a new corporation to be organized under the Laws of the State of Kansas, called the Atchison, Topeka & Santa Fe Railway Company, and did convey, assign and transfer to said corporation so organized the whole property of the Atchison Company purchased at the judicial sale aforesaid, whereupon the defendant, the New Atchison Company, became the owner of nearly all the stock of the Atlantic Company, and the plan of reorganization hereinbefore set forth was in all respects carried out.

Eleventh. That from the time of the appointment of the receivers for the Atchison Company, in August, 1893, said company and its receivers had failed to keep the covenant hereinbefore mentioned, embraced in the agreement between the Atchison Company, the St. Louis & San Francisco Railway Company and the Atlantic Company, to apply 25 per cent. of the earnings upon its system upon traffic exchange between the Atchison Company, the St. Louis & San Francisco Railway Company and the Western Division of the Atlantic & Pacific Railroad Company, to the first mortgage bonds of the latter, and by reason of such default the interest upon the guaranteed trust bonds of the Atlantic Company remained unpaid, whereupon the United States Trust Company, in or about the month of September, 1895, began an action in the Territorial Court of the Territory of New Mexico, to foreclose the first mortgage bonds executed on July 1st, 1880. That the defendant, Boston Safe Deposit & Trust Company, was made a party to said action, as trustee for the

holders of the income bonds hereinbefore mentioned, but said Boston Safe Deposit & Trust Company (as this plaintiff is informed and believes and therefore alleges) combining and confederating with the Atchison Company and the committee above mentioned, and fraudulently and corruptly designing to aid said Atchison Company and its owners in cutting off and extinguishing said income bonds and cheating and defrauding the holders and owners thereof, and in violation of its trust failed to interpose any defense or make any appearance in said action, but did wilfully and with the dishonest intent aforesaid allow judgment therein to go by default.

Twelfth. That while said action was pending, that is to say, during the year 1896, the committee aforesaid did purchase and receive from the owners thereof nearly the entire issue of the said first mortgage bonds of the Atlantic Company's Western Division and also nearly the entire issue of the Atlantic & Pacific Railroad Company's Western Division 4 per cent. guaranteed bonds, and having acquired such ownership, did at once proceed to force the sale of said Western Division under the judgment of foreclosure in the United States Trust Company's action aforesaid, so that on the third day of May, 1897, said Western Division, together with its land grants, equipment, appurtenances and franchises were sold under a decree of foreclosure to Aldace F. Walker, Chairman of the Board of Directors of the New Atchison Company, and R. Summers Hayes and Victor Morawitz, members of the committee aforesaid, for the sum of $12,000,000 and the purchasers at said mortgage sale did thereupon convey the property so purchased to the defendant, the New Atchison Company, free and discharged of the debt of said income bonds.

Thirteenth. And plaintiff alleges that in procuring the appointment of receivers of the Atchison Company and the foreclosure of the said $200,000,000 mortgage; in the arrangement to reorganize said company; in the acquisition by said committee of the first mortgage bonds of the Western Division of the Atlantic Company's railroad, and the sale thereof under foreclosure of said mortgage; and in all the proceedings, actions, suits, sales, conveyances and negotiations aforesaid, it was the purpose and intent of the Atchison Company, its stockholders and the said committee, to cut off and ex-
9 tinguish the income bonds aforesaid and to cheat and defraud the owners thereof and to preserve and continue in the Atchison Company and its stockholders the ownership of all the property of said company discharged of all such of its debts as might by abuse of legal process and other corrupt and dishonest methods be so cut off and extinguished.

Fourteenth. And plaintiff further shows that he is the lawful holder and owner in trust for Gilbert W. Chapin of the following income bonds of the Atlantic Company, issued and made as hereinbefore set forth and payable to bearer for the construction and equipment of the Western Division of said Atlantic Company's railroad: Five hundred dollar bonds Nos. 1, 27, 370, 382, 383 and 386; one thousand dollar bonds, Nos. 1, 13, 68, 114, 254, 289, 333, 445, 479, 489, 631, 685, 713, 962, 1,007, 1,159, 1,186, 1,364, 1,639, 1,668, 1,682, 1,706, 1,726, 1,849, 1,882, 1,944, 1,992, 2,113, 2,134, 2,140, 2,194, 2,256,

2,261, 2,262, 2,263, 2,264, 2,290, 2,300, 2,356, 2,376, 2,434, 2,497, 2,499, 2,507, 2,580, 2,623, 2,664, 2,668, 2,698, 2,710, 2,721, 2,871, 3,060, 3,063, 3,124, 3,143, 3,146, 3,332, 3,408, 3,411, 3,472, 3,506, 3,541, 3,544, 3,584, 3,600, 3,601, 4,008, 4,485, 4,530, 4,654, 4,914, 4,986, 5,274, 5,341, 5,574, 5,588, 5,656, 5,730, 5,834, 6,224, 6,341, 6,386, 6,407, 6,446, 6,557, 6,752, 6,877, 7,034, 7,193, 7,255, 7,894, 8,033, 8,096, 8,245, 8,266, 8,292, 8,776, 8,860, 8,934, 9,264, 9,504, 9,505, 9,506, 9,507, 9,508, 9,552, 9,553, 9,554, 9,555, 9,556, 9,562, 9,783, 9,789, 9,954, 10,013, and 10,017. And this plaintiff is informed and believes, and therefore alleges that the earnings of the said Western Division of the Atlantic Company's railroad have been in every year beginning with and since the first day of October, 1897, sufficient for the payment of the interest upon said bonds as such interest from time to time fell due.

That the principal of all of said bonds was due and payable on the first day of October, 1910, but no part thereof has been paid and, because of the foreclosure sales aforesaid and the corrupt and dishonest practices of the defendants in connection therewith, the Atlantic Company has not nor, since August, 1893, has it had any money wherewith to pay said bonds or the interest thereon or any part thereof, nor has it any property to which recourse can be had for the satisfaction of any judgment which he may recover against it, but such company is practically out of existence and all its property of every description is now and by the means aforesaid held by and vested in the New Atchison Company, the defendant. That the Atlantic Company has, as plaintiff is informed and believes, no agency in the City of Boston charged with the payment of said bonds nor any other place or representative where or of whom payment of the same can be demanded, or registry thereof requested.

That plaintiff is the assignee or transferee in trust for the benefit of Gilbert W. Chapin, plaintiff's immediate predecessor in title and the former owner and holder for value of said bonds, and that at the time of such assignment or transfer by said Chapin to plaintiff, he the said Chapin, was and now is a resident, inhabitant and citizen of the State of Connecticut, District of Connecticut, and at that time was and still would be, but for the assignment aforesaid, competent to bring this action in the District Court of the United States.

Fifteenth. And the plaintiff avers that neither he nor any other owner of said income bonds had notice of any of the suits, decrees, sales, negotiations, conveyances or proceedings hereinbefore set forth, nor was any opportunity afforded him or them to participate in the arrangement by which the Atchison Company was reorganized and the acquisition by it of the property of the Atlantic Company accomplished, nor was any offer at any time made to him or them of any money, property, bond, stock, right, privilege or security whatsoever for their compensation or protection, wholly or in part, as creditors and bondholders of the Atlantic Company, but such suits, negotiations and proceedings were carried on, such decrees entered and such sales and conveyances made in hostility to and defiance of the rights of this plaintiff and others as such creditors and bondholders.

Sixteenth. That the Boston Safe Deposit and Trust Company has violated and practically renounced its trust with respect to said income bonds, by the acts and omissions hereinbefore set forth; wherefore this suit is brought by the plaintiff individually, and the said Boston Safe Deposit and Trust Company is for that reason made a defendant herein.

Wherefore plaintiff prays judgment, as follows:

1. Against the defendant, Atlantic and Pacific Railroad Company, (1) for the sum of one hundred and twenty thousand dollars, being the amount of the principal of the income bonds of said defendant of which he is the holder and owner, with interest from the first day of October, 1910. (2) For the several amounts which by the terms of said bonds fell due for interest at the rate of six per cent. per annum, on the first day of April and the first day of October in each and every year, beginning with the interest which so fell due on the first day of October in the year 1893, and down to the time of the maturity of said bonds, on the first day of October, 1910, with legal interest upon each of such amounts from the date when they respectively, by the terms of said bonds, became due and payable.

2. Against the defendants, The Atchison, Topeka and Santa Fe Railway Company (herein called the New Atchison Company), and the Atchison, Topeka and Santa Fe Railroad Company (herein called the Atchison Company), declaring and adjudging said defendants and each of them upon the facts in this bill of complaint set forth, to be liable for the amount of the said income bonds and for such judgment thereon as may be recovered against the defendant, Atlantic and Pacific Railroad Company; and also declaring and adjudging such judgment against said Atlantic Company to be a lien upon all and singular the property, real and personal, of said the Atchison, Topeka and Santa Fe Railway Company and Atchison, Topeka and Santa Fe Railroad Company, and of both of them.

3. For such other and further relief in the premises as may be just and equitable.

WOOD, COOKE & SEITZ,
Solicitors for Plaintiff,
63 *Wall Street, New York, N. Y.*

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Francis Sherwood Male, being duly sworn, says: That he is the plaintiff herein; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

FRANCIS SHERWOOD MALE.

Sworn to before me this 24th *24th* day of December, 1913.
CHARLES W. ROTH,
Commissioner of Deeds, City of New York.

11 "A."

This Indenture, made this first day of October, in the year of our Lord one thousand eight hundred and eighty, by and between the Atlantic & Pacific Railroad Company, a corporation duly organized and existing under the laws of the United States of America, party of the first part, and the Boston Safe Deposit and Trust Company, a corporation duly organized and existing under the laws of the State of Massachusetts, party of the second part, witnesseth:

That Whereas said party of the first part is the owner of a certain line of railway and telegraph now in process of construction between the Rio Grande River and the Pacific Ocean, beginning at Albuquerque on the Rio Grande River in the Territory of New Mexico, and thence running westwardly by way of the Agua Frio, or other suitable pass, to the headwaters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude, as near as may be found most suitable for a railway route to the Colorado River, at such point as may be selected by the party of the first part for crossing; thence by the most practicable and eligible route to the Pacific Ocean, or however otherwise located or described, being known as the Western Division of the Atlantic & Pacific Railroad; and the party of the first part is now constructing and will construct, complete, equip, and open the same for traffic as rapidly as practicable.

And Whereas the party of the first part, on the first day of July, A. D. 1880, mortgaged the railroad, telegraph, equipment, appurtenances and other property mentioned in said mortgage or intended so to be, now and hereafter composing or appertaining to said Western Division, to the United States Trust Company of New York, Trustee, to secure the payment of the principal and interest of its first mortgage, six per cent., coupon and registered, gold bonds to an amount not exceeding twenty-five thousand dollars a mile, to be issued and disposed of from time to time, upon such terms as the directors of the party of the first part deem expedient;

And Whereas, in case the proceeds of said bonds and of the income bonds hereinafter provided for shall prove insufficient to pay the cost of construction and equipment, including interest on said first mortgage bonds, until the completion of said Division to the Pacific Coast, or until said party of the first part shall, by a contract with any other road, form a through line to the Pacific Coast, and for one year thereafter; or in case the Atchison, Topeka & Santa Fe Railroad Company and the St. Louis & San Francisco Railway Company, under their contract of guaranty indorsed upon said mortgage, make any advances to the party of the first part, at any time, to pay the interest on said first mortgage bonds, in whole or in part, the party of the first part, in accordance with its agreement so to do, hereby reserves the right to issue its second mortgage interest-bearing bonds to an amount not exceeding ten thousand dollars a mile, and to dispose of them on such terms as the directors of said party of the first

part deem advisable, and to secure the payment of the principal and interest of the same by a mortgage of said franchises, rights, railroad, telegraph, equipment, appurtenances, and other property to one or more trustees, subject only to the lien created by said first mortgage.

And Whereas the party of the first part has determined to make and issue its income bonds to an amount not exceeding eighteen thousand seven hundred and fifty dollars a mile, to consist of a series of bonds registered of the denominations of $500, $1,000, $5,000 and $10,000, and bonds to bearer of the denominations of $50, $100, $500 and $1,000, with dividend warrants attached, all of said bonds to be of even date herewith, and the principal sum therein named to be payable in lawful money of the United States of America on the first day of October, A. D. 1910, at the agency of the party of the first part in the city of Boston, in the State of Massachusetts, with interest thereon in like currency payable at said agency semi-annually, on the first day of April and the first day of October, from the net earnings of said Western Division during the six months ending on the first day of January and the first day of July, respectively, preceding in each year, whatever said earnings may be, but not exceeding three per cent. for each six months, and non-cumulative; the net earnings applicable to such payments being the earnings of said Western Division for such six months properly applicable to dividends, after deducting therefrom all necessary payments and expenditures, including interest, and providing for the maintenance, renewals, and necessary repairs and improvements of said railroad, telegraph, equipment, and appurtenances;

And Whereas the party of the second part is willing to act as trustee for the benefit and security of any and all persons and corporations who may be or become holders of any of said income bonds;

12 Now, Therefore, the party of the first part, in consideration of the premises, and one dollar to it in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, and to secure the payment of the principal and interest of said income bonds according to the tenor thereof, without preference, by reason of priority of issue, or any cause or thing whatsoever, does for itself, its successors and assigns, hereby covenant and agree to and with the party of the second part, who is hereby declared to be the trustee for any and all persons and corporations who may be or become holders of any of said income bonds, and to and with its successor or successors in said trust, that it will semi-annually, as soon as may be after the first day of January and the first day of July, and at least ten days before the first day of April and the first day of October, respectively, in each year during the continuance of this trust, make up and furnish to the trustee for the time being a fair and just account of the payments, expenses, and gross and net earnings of said Western Division for the six months ending on said first day of January or July, as the case may be, so as to exhibit

the true sum applicable to the payment of interest on said income bonds; and will pay the said interest, or so much thereof as has been earned, on the first days of April and October, respectively, according to the true intent and meaning hereof.

And at all reasonable times the said trustee or its successor in said trust, or its or his agents or attorneys may, and, upon the written request of holders of said bonds to the amount of one million dollars and with proper indemnity for expenses, shall, examine all the books, documents, and papers of the party of the first part in any manner relating to its earnings and expenditures upon said Western Division, for the purpose of verifying and correcting said accounts; and all said books, documents and papers shall at all reasonable times be accessible to the said trustee, its or his agents or attorneys.

And the party of the second part hereby accepts said trust, and agrees to execute the same, but without any responsibility except for wilful default or gross negligence in the premises, and without any liability for the defaults or negligence of any agent or attorney selected in good faith in the discharge of said trust.

The present or any future trustee may resign upon thirty days' notice to said Company, and to the registered holders of said income bonds, or may be removed at any time by a vote of a majority in interest of said income bondholders, at any meeting of the said bondholders, such vote being attested by the signatures of the persons so voting, or by the party of the first part, with the written consent of one-fourth in interest of said bondholders; and any vacancy caused by the dissolution, death, removal, resignation, incapacity, or refusal to act, of the present or any future trustee, may be filled by appointment made by the party of the first part, or by the majority in interest of said bondholders, or, in case of their failure to make such appointment for a period of sixty days, by any Justice of the Supreme Court of the United States, upon the application of any of the parties in interest; and, immediately upon the making of such appointment, in any of the ways aforesaid, all the rights, powers and interests hereby conferred upon the trustee herein named, its successor or successors in said trust, shall pass to and become vested in such substituted trustee, without any other or further acts or deeds whatsoever.

Meetings of said bondholders may be called at any time by either of the parties hereto, by holders of said bonds, to the amount of one million dollars, or a less amount if so many are not outstanding, or by a committee of said bondholders appointed at a previous meeting, by publishing notice of the time and place of said meeting at least twice a week in one or more daily newspapers published in the cities of Boston and New York, for six weeks prior to the time appointed. And every bondholder in person or by proxy, may vote at such meeting in proportion to the amount of said bonds owned and held by him.

In Witness Whereof, the parties hereto have severally caused their corporate seals to be hereto affixed, and these presents to be signed

by their respective presidents, and attested by their respective secretaries, on the day and year first above written.

ATLANTIC & PACIFIC RAILROAD COMPANY,
(Signed) By THOS. NICKERSON, *President.*

[L. S.] Attest:
(Signed) S. W. REYNOLDS, *Secretary.*

BOSTON SAFE DEPOSIT AND TRUST COMPANY,
(Signed) By F. M. STONE, *President.*

[L. S.] Attest:
(Signed) EDWARD P. BOND, *Secretary.*

13 COMMONWEALTH OF MASSACHUSETTS,
City of Boston, County of Suffolk, ss:

On this first day of October, A. D. 1880, before me, Levi C. Wade, a Notary Public in and for said City and County, personally appeared Thos. Nickerson and S. W. Reynolds, known to me to be respectively President and Secretary of the said Atlantic and Pacific Railroad Company, and also F. M. Stone and Edward P. Bond, known to me to be respectively President and Secretary of said Boston Safe Deposit and Trust Company, and on oath severally deposed and said that they were respectively such Presidents and Secretaries, that they executed the foregoing instrument and affixed the corporate seals of the said Companies thereto, as appears, by order of their respective Boards of Directors, and by the like authority they severally acknowledged the same to be the free act and deed of said Companies respectively.

In Witness Whereof, I have signed my name and affixed my notarial seal hereto, the day and year above written.

[L. S.] (Signed) LEVI C. WADE.

Form of Registered Bond.

No. —. $—.

United States of America.

Atlantic & Pacific Railroad Company,
Western Division.

For value received, the Atlantic & Pacific Railroad Company promises to pay to the Boston Safe Deposit and Trust Company, or the registered holder hereof, the sum of — dollars, in lawful money of the United States of America, on the first day of October, A. D. 1910, with interest payable semi-annually, on the first day of April and the first day of October in each year, from the net earnings of the Western Division of the Atlantic & Pacific Railroad during the six months

ending on the first day of January and the first day of July, respectively, preceding, whatever said net earnings may be, but not exceeding three per cent. for each six months, and non-cumulative; the net earnings applicable to such payments being the earnings of said Western Division for such six months properly applicable to dividends, after deducting therefrom all necessary payments and expenditures relative to said Western Division, including interest, and providing for the maintenance, renewals, and necessary repairs and improvements of the same. Both principal and interest are payable at the agency of said railroad company, in the City of Boston, in the State of Massachusetts.

It is agreed between the Atlantic & Pacific Railroad Company and the holder of this bond that no recourse shall be had for its payment to the individual liability, if any, of any stockholder of the Company.

This bond is one of a series of income bonds, coupon and registered, not exceeding in amount eighteen thousand seven hundred and fifty dollars a mile, issued for the purposes of construction and equipment of the Western Division of the Atlantic & Pacific Railroad; and all said bonds, without any preference, are entitled to the benefit of the provisions of an Indenture of even date herewith, executed by the Atlantic & Pacific Railroad Company and the Boston Safe Deposit and Trust Company, Trustee.

This bond is transferable only upon the books of the Atlantic & Pacific Railroad Company by the registered holder or his duly authorized attorney, and is not valid unless authenticated by a certificate endorsed hereon, signed by said trustee, or its successor in said trust.

In Witness Whereof, the Atlantic and Pacific Railroad Company has caused its corporate seal to be affixed hereto, and these presents to be signed by its President and attested by its Secretary, this first day of October, A. D. 1880.

[SEAL.] ATLANTIC & PACIFIC RAILROAD COMPANY,

By —— ——, *President.*

Attest:

—— ——, *Secretary.*

14 *Form of Bonds, with Dividend Warrants Attached.*

No. —. $—.

United States of America.

Atlantic & Pacific Railroad Company,
Western Division.

For value received, the Atlantic & Pacific Railroad Company promise- to pay to the Boston Safe Deposit and Trust Company, or bearer, the sum of — dollars in lawful money of the United States of America, on the first day of October, A. D. 1910, with interest payable semi-annually on the first day of April and the first day of October

in each year, from the net earnings of the Western Division of the Atlantic & Pacific Railroad during the six months ending on the first day of January and the first day of July, respectively, preceding, whatever said net earnings may be, but not exceeding the rate of three per cent. for each six months, and non-cumulative, upon presentation of the dividend warrants hereto annexed; the net earnings applicable to such payments being the earnings of said Western Division properly applicable to dividends, after deducting therefrom all necessary payments and expenditures relative to said Western Division, including interest, and providing for the maintenance, renewals, and necessary repairs and improvements of the same. Both principal and interest are payable at the agency of said Railroad Company, in the City of Boston, in the State of Massachusetts. It is agreed between the Atlantic and Pacific Railroad Company and the holder of this bond that no recourse shall be had for its payment to the individual liability, if any, of any stockholder of the Company.

This bond is one of a series of income bonds, coupon and registered not exceeding in amount eighteen thousand seven hundred and fifty dollars a mile, issued for the purposes of construction and equipment of the Western Division of the Atlantic and Pacific Railroad; and all said bonds, without any preference, are entitled to the benefit of an indenture of even date herewith, executed by the Atlantic & Pacific Railroad Company and the Boston Safe Deposit and Trust Company, Trustee.

This bond is transferable by delivery, or, upon surrender of the dividend warrants hereto annexed, it may be registered, and thereafter will be transferable only upon the books of the railroad company by the registered holder or his duly authorized attorney, and principal and interest will be payable accordingly. This bond is not valid unless authenticated by a certificate indorsed hereon, signed by said trustee, or its successor in said trust.

In Witness Whereof, the Atlantic & Pacific Railroad Company has caused its corporate seal to be hereto affixed, and these presents to be signed by its President, and attested by its Secretary, on this first day of October, A. D. 1880.

[SEAL.] ATLANTIC & PACIFIC RAILROAD COMPANY,

By —— ——, *President.*

Attest:

——, ——, *Secretary.*

Trustee's Certificate.

The within bond is one of the series of income bonds, coupon and registered, mentioned in, and is entitled to the benefit of, an indenture of even date executed by the said Atlantic & Pacific Railroad Company to the Boston Safe Deposit and Trust Company, Trustee, its successor or successors in said trust.

—— ——, *Trustee.*

Dividend Warrant.

The Atlantic & Pacific Railroad Company will pay to the bearer on the first day of April, on surrender of this warrant, at its agency in the City of Boston, Mass., the proportionate part of the net income of its Western Division for the half calendar year ending on the first day of — preceding, according to the terms and conditions of its income bond No. —, but not exceeding — dollars.

——— ———, *Treasurer.*

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Jan. 12, 1914.

15 District Court of the United States for the Southern District of New York.

In Equity. 11—43.

FRANCIS SHERWOOD MALE, as Trustee for Gilbert W. Chapin, Plaintiff,
against
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ATCHISON, Topeka and Santa Fe Railroad Company, Atlantic and Pacific Railroad Company, and Boston Safe Deposit and Trust Company, Defendants.

Notice of Special Appearance.

Take notice that the defendant The Atchison, Topeka and Santa Fe Railway Company appears specially in this suit for the single and sole purpose of making a motion to set aside the service of the subpœna and to dismiss the bill of complaint herein as to said defendant The Atchison, Topeka and Santa Fe Railway Company, with costs, for want of jurisdiction of the person of the said defendant in this court, and for no other purpose, in that

First. This court is without jurisdiction of the person of the said defendant The Atchison, Topeka and Santa Fe Railway Company, in that it appears upon the face of the bill of complaint herein that the Atlantic and Pacific Railroad Company is a corporation created by an Act of Congress prior to the first day of January, 1872, and that in the bill of complaint herein not only is the defendant Atlantic and Pacific Railroad Company made a defendant jointly with this defendant, The Atchison, Topeka and Santa Fe Railway Company,

16 but the prayer for relief against this defendant, The Atchison, Topeka and Santa Fe Railway Company is predicated upon a judgment having been first obtained against the defendant Atlantic and Pacific Railroad Company, and that therefore this suit as to the defendant The Atchison, Topeka and Santa Fe Railway Company is a suit necessarily arising under the laws of the United States, and that the said defendant The Atchison, Topeka and Santa

Fe Railway Company is a corporation created by and existing under the laws of the State of Kansas, and is a resident and inhabitant of the District of Kansas, and is not a resident or inhabitant of the State of New York, and that the defendant Atchison, Topeka and Santa Fe Railroad Company is a corporation organized under an act of the Legislature of the Territory of Kansas and is not a resident or inhabitant of the State of New York, and that the defendant, Boston Safe Deposit and Trust Company is a Banking Corporation organized under the laws of the State of Massachusetts and is not a resident or inhabitant of the State of New York; and

Second. It appears to the satisfaction of this Court that this suit is improperly and collusively brought by the alleged plaintiff in violation of Sections 37 (36 United States Statutes at Large, page 1098), and 51 (36 United States Statutes at Large, page 1101), of the Judicial Code, in that the jurisdiction of this Court for the Southern District of New York over this cause being dependent on diversity of citizenship of the plaintiff and defendant and the residence therein of one of the said parties, and that said defendant The Atchison, Topeka and Santa Fe Railway Company being a corporation created by and existing under the laws of the State of Kansas and being a citizen and resident of the State and District of Kansas, and not being a citizen or resident of the State of New York or of the Southern District thereof, Gilbert W. Chapin, who is a citizen and resi-

17 dent of the State and District of Connecticut, and not a citizen or resident of the State of New York or of the Southern District thereof, and who is the real owner of the income bonds of the Atlantic and Pacific Railroad Company referred to in the bill of complaint herein, and therefore the real party plaintiff in interest, transferred and assigned said bonds to Francis Sherwood Male as trustee, the alleged plaintiff in this suit, who is alleged to be a citizen and resident of the State of New York and of the Southern District of New York, for the sole purpose of enabling suit on said bonds to be brought in this District Court for the Southern District of New York; and that

I am retained by and appearing as Solicitor for the said The Atchison, Topeka and Santa Fe Railway Company in this suit specially and for the single and sole purpose of making said motion, and not for any other purpose, and that this defendant does not submit in any way to the jurisdiction of this Court.

Dated, New York, February 17, 1914.

Yours, &c.,

WALKER D. HINES,

Solicitor, Appearing Specially in This Suit for The Atchison, Topeka and Santa Fe Railway Company for the Single and Sole Purpose of Making This Motion to Set Aside the Service of the Subpœna and Dismiss the Bill of Complaint Herein as to said Defendant, and Not for Any Other Purpose.

Office and P. O. Address, No. 52 William Street, Borough of Manhattan, New York City.

To Wood, Cooke & Seitz, Esqrs., Solicitors for Plaintiff, 63 Wall Street, New York City.

(Endorsed:) U. S. District Court, S. D. of N. Y., Filed Feb. 18, 1914.

18 *Order to Show Cause.*

District Court of the United States for the Southern District of New York.

In Equity. 11—43.

FRANCIS SHERWOOD MALE, as Trustee for Gilbert W. Chapin,
Plaintiff,
against
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ATCHISON, Topeka and Santa Fe Railroad Company, Atlantic and Pacific Railroad Company, and Boston Safe Deposit and Trust Company, Defendants.

On the subpœna and bill of complaint and all the papers and records of the Court in this cause, and upon reading the annexed affidavits of A. S. H. Bristow, verified February 17, 1914, and on motion of Walker D. Hines, solicitor, appearing specially for the defendant The Atchison, Topeka and Santa Fe Railway Company, for the single and sole purpose of making a motion to set aside the subpœna and the service thereof and to dismiss the bill of complaint herein as to said defendant The Atchison, Topeka and Santa Fe Railway Company, with costs, for want of jurisdiction of the person of said defendant in this Court, and not for any other purpose, it is

Ordered, that the plaintiff herein show cause on a motion day of this Court to be held in its court room in the United States Post Office Building, in the Borough of Manhattan, City of New York, State of New York, on the 20th day of February, 1914, at 10:30 o'clock in the forenoon or as soon thereafter as counsel can be heard, why an order should not be made dismissing the bill of com-
19 plaint herein with costs as to the said defendant The Atchison, Topeka and Santa Fe Railway Company, upon the following grounds:

First. That this Court is without jurisdiction of the person of the said defendant The Atchison, Topeka and Santa Fe Railway Company, in that it appears upon the face of the bill of complaint herein that the defendant Atlantic and Pacific Railroad Company is a corporation created by an Act of Congress prior to the first day of January, 1872, and that in the bill of complaint herein not only is the defendant Atlantic and Pacific Railroad Company made a joint defendant with this defendant, The Atchison, Topeka and

Santa Fe Railway Company, but the prayer for relief against this defendant, The Atchison, Topeka and Santa Fe Railway Company, is predicated upon judgment being first obtained against the said Atlantic and Pacific Railroad Company and that this suit as to the defendant The Atchison, Topeka and Santa Fe Railway Company is a suit necessarily arising under the laws of the United States, and that the said defendant The Atchison, Topeka and Santa Fe Railway Company is a corporation created by and existing under the laws of the State of Kansas, and is a resident and inhabitant of the District of Kansas, and is not a resident or inhabitant of the State of New York, and that the defendant Atchison, Topeka and Santa Fe Railroad Company is a corporation organized under an Act of the Legislature of the Territory of Kansas and is not a resident or inhabitant of the State of New York, and that the defendant, Boston Safe Deposit and Trust Company is a Banking Corporation organized under the laws of the State of Massachusetts and is not a resident or inhabitant of the State of New York.

Second. That it appears to the satisfaction of this Court that this suit is improperly and collusively brought by the alleged plaintiff in violation of Sections 37 (36 United States Statutes at Large, page 1098) and 51 (36 United States Statutes at Large, page 1101), of the Judicial Code, in that the jurisdiction of this Court for the Southern District of New York over this cause being dependent on diversity of citizenship of the plaintiff and defendant and the residence therein of one of the said parties, and that said defendant The Atchison, Topeka and Santa Fe Railway Company being a corporation created by and existing under the laws of the State of Kansas and being a citizen and resident of the State and District of Kansas, and not being a citizen or resident of the State of New York or of the Southern District thereof, Gilbert W. Chapin, who is a citizen and resident of the State and District of Connecticut, and not a citizen or resident of the State of New York or of the Southern District thereof, and who as appears from the bill of complaint is the real owner of the income bonds of the Atlantic and Pacific Railroad Company referred to in the bill of complaint herein, and therefore the real party plaintiff in interest, transferred and assigned said bonds to Francis Sherwood Male as trustee, the alleged plaintiff in this suit who is alleged to be a citizen and resident of the State of New York and of the Southern District of New York, for the sole purpose of enabling suit on said bonds to be brought in this District Court for the Southern District of New York; and it is hereby further

Ordered, that if it becomes necessary for the said defendant to answer to the merits, that the defendant's time to do so or to plead or otherwise move with respect to said bill of complaint be and it hereby is extended until [ten]* days after the entry of an order by this Court determining the motion aforesaid.

20

Sgd. J. M. M.

five

[* Word enclosed in brackets erased in copy.]

21 Service of a copy of this order and of the annexed affidavits on which this order is granted made on the solicitors for the plaintiff on or before the 18th day of February, 1914, shall be sufficient.

Dated, New York, February 17th, 1914.

(Sgd.) JULIUS M. MAYER,
U. S. D. J.

22 *Affidavit of A. S. H. Bristow.*

District Court of the United States for the Southern District of New York.

FRANCIS SHERWOOD MALE, as Trustee for Gilbert W. Chapin,
Plaintiff,
against
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Atchison, Topeka and Santa Fe Railroad Company, Atlantic and Pacific Railroad Company and Boston Safe Deposit and Trust Company, Defendants.

STATE OF NEW YORK,
County of New York, ss:

A. S. H. Bristow, being duly sworn, says: I am a solicitor in the office of Walker D. Hines, solicitor for the defendant, The Atchison, Topeka and Santa Fe Railway Company herein appearing specially for the single and sole purpose of making a motion to set aside the subpœna herein and the service of said subpœna and to dismiss the bill of complaint herein as to said defendant The Atchison, Topeka and Santa Fe Railway Company, with costs, for want of jurisdiction of the person of said defendant in this Court, and not for any other purpose. This suit was commenced by the service of subpœna and bill of complaint on January 12, 1914, upon D. L. Gallup, the Comptroller of this defendant. No general appearance has been filed on behalf of this defendant nor have any steps other than the application for this order to show cause been taken, except that in pursuance of an order to show cause granted by Judge J. M. Mayer on January 26th, 1914, this
23 defendant on January 27, 1914, filed in this Court a notice of special appearance in this suit for the single and sole purpose of making a motion to set aside the service of the subpœna and to dismiss the bill of complaint herein as to said defendant The Atchison, Topeka and Santa Fe Railway Company, with costs, for want of jurisdiction of the person of the said defendant in this Court in that the jurisdiction of this Court in this cause as to said defendant was based solely upon the diversity of citizenship of the plaintiff and said defendant, and that said defendant was a corporation created by and existing under the laws of the State of Kansas, and was a resident of the District of Kansas and was not a resident of the State of New York and was not doing business within the State of New York, and for no other purpose, and except that in

pursuance of said order to show cause the said motion to set aside the service of the subpœna and to dismiss the bill of complaint herein as to said defendant The Atchison, Topeka and Santa Fe Railway Company was argued in this Court on February 13, 1914, which said motion was on February 16, 1914, denied by this Court. The reason why no previous steps have been taken with respect to the matters involved in the order to show cause herein requested is that it was deemed proper that the aforesaid motion to set aside the service of the subpœna and to dismiss the bill of complaint herein as to this defendant The Atchison, Topeka and Santa Fe Railway Company argued in this Court on February 13, 1914, should first be disposed of by this Court before any further action should be taken by this defendant that might by any possibility be
24 construed as a waiver of the right to make the objection raised by the said motion to set aside the subpœna and bill of complaint herein as to this defendant. The aforesaid order granted by Judge J. M. Mayer as aforesaid expressly ordered "that if it becomes necessary for the said defendant to answer to the merits, that the defendant's time to do so or to plead or otherwise move with respect to said bill of complaint be, and it hereby is, extended until 10 days after the determination by this Court, of the motion aforesaid." The reason why this order to show cause is requested is that the time within which this defendant must answer may expire on Thursday, February 26th, 1914, and that this defendant has not time to give the regular five days' notice of motion in order to get the motion heard at the next motion day of this Court, to-wit, on February 20, 1914, on which date it is necessary that this motion be set for hearing inasmuch as the said motion day is the only motion day intervening prior to February 26th, 1914, when the time for this defendant to answer may expire as aforesaid.

No previous application for this order to show cause has been made.

A. S. H. BRISTOW.

Sworn to before me this 17th day of February, 1914.

[Seal Grandin T. Vought, Notary Public, New York County.]

GRANDIN T. VOUGHT,
Notary Public, No. 3888, New York County.

25 *Affidavit of A. S. H. Bristow.*

District Court of the United States for the Southern District of New York.

FRANCIS SHERWOOD MALE, as Trustee for Gilbert W. Chapin, Plaintiff,
against
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Atchison, Topeka and Santa Fe Railroad Company, Atlantic and Pacific Railroad Company, and Boston Safe Deposit and Trust Company, Defendants.

A. S. H. Bristow being duly sworn, says: I am a solicitor in the office of Walker D. Hines, solicitor for the defendant, The Atchison, Topeka and Santa Fe Railway Company herein appearing specially for the single and sole purpose of making a motion to dismiss the bill of complaint herein as to said defendant The Atchison, Topeka and Santa Fe Railway Company, with costs, for want of jurisdiction of the person of said defendant in this Court, and not for any other purpose; that on or about the 18th day of October, 1913, Mr. Cooke, of the firm of Wood, Cooke & Seitz, No. 63 Wall Street, in the Borough of Manhattan, City of New York, solicitors for the plaintiff in this suit, called at said office of Mr. Walker D. Hines; that through the instructions of Mr. Hines said Mr. Cooke was referred to deponent; that said Mr. Cooke stated in conversation with deponent that his firm, the said Wood, Cooke & Seitz, contemplated the bringing of a suit in the Federal District Court for the District of Connecticut against The Atchison, Topeka & Santa Fe Rail-
26 way Company on behalf of the owner of certain income bonds of the Atlantic & Pacific Railroad Company, and requested that said Mr. Hines should undertake to have the said The Atchison, Topeka & Santa Fe Railway Company enter an appearance in that suit; that said Mr. Cooke during the course of the same conversation stated that an appearance on the part of The Atchison, Topeka & Santa Fe Railway Company as requested would relieve the said firm of Wood, Cooke & Seitz of some inconvenience, but that if said appearance was not entered it would be possible to make service upon the said The Atchison, Topeka & Santa Fe Railway Company; that deponent declined to make any definite response to said Mr. Cooke until the matter had been brought to the attention of said Mr. Hines; that Mr. Hines upon being consulted in the matter stated that he was unwilling to consider the request of Mr. Cooke unless he was furnished with a copy of the bill in said suit; that on or about October 18, 1913, Mr. Cooke was advised over the telephone by deponent of the attitude of Mr. Hines; that Mr. Cooke thereupon sent to this deponent a copy of a bill of complaint entitled: District Court of the United States for the District of Connecticut, In Equity, Gilbert W. Chapin, Plaintiff, against The Atchison, Topeka & Santa Fe Railway Company, Atchison, Topeka & Santa

Fe Railroad Company, Atlantic & Pacific Railroad Company, and Boston Safe Deposit & Trust Company, Defendants; that after the examination of the said bill by Mr. Hines, deponent notified Mr. Cooke over the telephone that The Atchison, Topeka and
27 Santa Fe Railway Company would not enter its appearance and on the same day returned the said copy of bill submitted by Mr. Cooke to the office of said Wood, Cooke & Seitz; that while said copy of bill was in deponent's possession he carefully examined the same and that the same undertook to set up in the name of Gilbert W. Chapin as plaintiff the same alleged cause of action which the bill herein undertakes to set up in the name of Francis Sherwood Male, as Trustee for Gilbert W. Chapin, and that said bill so sent to this deponent and so returned by him was printed and was substantially the same as the bill herein, except that in the bill herein certain typewritten additions and modifications have been made striking out of the caption to the bill the word "Connecticut", and substituting the words "Southern" and "New York", and attempting to show in the body of the bill that the plaintiff, Francis Sherwood Male, is the assignee or transferee in trust for the benefit of Gilbert W. Chapin, and is a citizen and resident of the State of New York and an inhabitant and resident of the Southern District thereof and substituting in the verification of the bill the name of "Francis Sherwood Male" for the name of "Gilbert W. Chapin" and changing the caption of said verification so as to read: "State of New York, City of New York, County of New York, ss:" instead of "State of Connecticut, County of Hartford," and changing the date of said verification from "September 1913" to "December 1913"; and deponent says that to the best of his belief the bill herein, subject to said typewritten additions and modifications, is identical with said printed copy of bill so sent to this defendant and so returned by
28 him.

A copy of the bill of complaint herein is made a part of this affidavit and will be handed up to the Court upon the argument as an exhibit.

A. S. H. BRISTOW.

Sworn to before me this 17th day of February, 1914.

[Seal Grandin T. Vought, Notary Public, New York County.]

GRANDIN T. VOUGHT,
Notary Public, New York County, No. 3888.

(Endorsed:) Service of the within affidavits and order to show cause is hereby admitted. Dated New York, February 18, 1914. Wood, Cooke & Seitz, Solicitors for Plaintiff. U. S. District Court, S. D. of N. Y. Filed Mar. 13, 1914.

29 *Affidavit of Howard O. Wood.*

United States District Court, Southern District of New York.

FRANCIS SHERWOOD MALE, etc.,
against
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY et al.

STATE OF NEW YORK,
Southern District of New York, ss:

Howard O. Wood, being duly sworn, says: I am a member of the firm of Wood, Cooke & Seitz, solicitors for the complainant.

This action is brought, as appears from the bill of complaint, whereof a copy is herewith submitted, to recover from the Atchison, Topeka and Santa Fe Railway Company, the sum of $120,000, with interest, the face value of so called "income bonds", issued the 1st October, 1880, by the Atlantic and Pacific Railroad Company, and due the 1st day of October, 1910. The total issue being $12,000,000.

The Atlantic and Pacific Railroad Company was controlled and owned by the Atchison, Topeka and Santa Fe Railroad Company, the predecessor of the Atchison, Topeka and Santa Fe Railway Company.

The only security for this issue of bonds except the alleged security afforded by the agreement with the Boston Safe Deposit & Trust Company hereinafter set forth, was the promise of the obligor to pay the principal thereof, and its further promise to pay the interest thereon from the net earnings of its "Western Division".

The principal and interest of such bonds were made payable to the Boston Safe Deposit & Trust Company, in Boston,
30 Massachusetts, by virtue of "an indenture" executed by the Atlantic and Pacific Railroad Company and the Boston Safe Deposit & Trust Company the 1st October, 1880. By this "indenture" which has erroneously been called "a deed of trust" it was provided that the Atlantic and Pacific Railroad Company, the obligor, should semi-annually furnish the Boston Safe Deposit & Trust Company, erroneously called "the trustee", "a fair and just account of the payments, expenses, and gross and net earnings of the said "Western Division" for the six preceding months; "it being further provided that the Boston Safe Deposit & Trust Company might "upon the written request of the holders of income bonds to the amount of $1,000,000, and with proper indemnity for expenses, examine all the books * * * of the Railroad Company in any manner relating to its earnings from and expenditures for said Western Division."

Other than this contingent obligation or duty, the said misdescribed "trustee" had no duties to perform other than the distribution of interest money if any ever reached it, and it has in truth and in fact never made and never can make any such examination of the books, and never has distributed any interest money, and never has

earned and never can earn any commissions or compensation by virtue of such indenture.

The so called "debenture bonds" held by complainant are in truth and in fact nothing but the promissory notes or certificates of indebtedness of the Atlantic and Pacific Railroad Company, secured by nothing but the promise of that Company and that of the Atchison, Topeka Railroad and the St. Louis and San Francisco Railway that a percentage of the earnings of the obligor should be applied to payment of interest thereon.

31 Subsequently by and through various foreclosure actions conducted in Kansas, New Mexico, Arizona and California, as more fully set out in the bill of complaint, the Atchison, Topeka and Santa Fe Railway Company, the successor of the Atchison, Topeka and Santa Fe Railroad Company came into and now has the possession and ownership of all the property of the Atlantic and Pacific Railroad. That in such actions where the Boston Safe Deposit & Trust Company was made a party defendant the Court had no jurisdiction over it, and it defaulted both in appearing and answering; and in the main foreclosure action, that of the $200,000,000 mortgage of the Atchison, Topeka and Santa Fe Railroad Company, the Boston Safe Deposit & Trust Company was not even made a party, as more fully appears in Article Eighth of the bill of Complaint.

The only party defendant in this suit which has been served with process or the subpœna herein is the Atchison, Topeka and Santa Fe Railway Company. Neither the Atchison, Topeka and Santa Fe Railroad Company, the Atlantic and Pacific Railroad Company nor the Boston Safe Deposit & Trust Company has been so served nor can either or any of them be served, nor have either or any of them voluntarily appeared herein. Each and all of them is beyond and without the jurisdiction of this Court, nor is either or any of them doing business or can be found within this district.

Each and all of said last named defendants are merely formal or nominal parties, and neither and none of them is in any aspect or for any purpose either a necessary or indispensable party. As above set forth and as appears from the bill of complaint the Boston Safe Deposit & Trust Company is, that is to say was, a mere agent

32 or auditor for the holders of the so called "income bonds," and in no sense a trustee, and with no obligation to render any services or perform any duties except upon the request of the holders of at least $1,000,000, of such alleged bonds, the rendition of such services being further conditioned upon indemnification against all expense thereby incurred. Both the Atchison, Topeka and Santa Fe Railroad Company and the Atlantic and Pacific Railroad, if still in existence, are mere fictitious organizations, existing only on paper, performing no functions, owning no property and having no actual place of business, and for all that deponent knows having no corporate organization.

At all the times and until the reorganization in the bill of complaint mentioned, the Atlantic and Pacific Railroad was owned by the Atchison, Topeka and Santa Fe Railroad Company, and upon

such reorganization all the property of the Atlantic and Pacific Railroad Company came into the possession and ownership of the Atchison, Topeka and Santa Fe Railway Company, such property consisting amongst other things of a line of railroad extending from Albuquerque in New Mexico, across that State to Gallup near the Arizona boundary, across Arizona to the Needles on the eastern boundary of California, and thence westward across California to the sea coast, as is shown in detail and at large in the maps, time tables and folders issued by the Atchison, Topeka and Santa Fe Railway Company, and as is more fully set forth in the final decree made and entered the 10th day of April, 1896, in the Territorial Court of the Territory of New Mexico in the suit brought by the United States Trust Company to foreclose the first mortgage of the Atlantic and Pacific Railroad Company.

No decree that may be entered herein in favor of complain-
33 ant can in any way injuriously affect said three non-appearing defendants, each of whom has been made a party to this suit, only for the purpose of showing the devolution of liability to and upon the Atchison, Topeka and Santa Fe Railway Company, and against neither and none of whom does complainant need, require or desire any affirmative or other relief. And neither and none of said three defendants has any interest whatsoever in this controversy and litigation; and should either or any of them deem that it has any such interest, complainant now consents that it shall be provided by decree herein, that the same shall not conclude or prejudice them or either of them, and shall be without prejudice to any of their rights.

The complainant in this suit took title to all the alleged "income bonds" in the bill of complaint mentioned, by virtue of an assignment or conveyance in trust, duly made and executed by Gilbert W. Chapin the 22nd day of December, 1913, reading in part as follows:

"I, Gilbert W. Chapin, of Hartford, in the State of Connecticut, do hereby assign, set-over and transfer unto Francis S. Male, of the City, County and State of New York, all my right, title and interest in each and every of the following bonds, of the Atlantic and Pacific Railroad Company: (setting forth the bonds described in the bill of complaint) in trust nevertheless for the following uses and purposes, namely, to collect the rents, issues, income profits or principal of said bonds, for my use, with full power and authority in his name as trustee, to institute, maintain or carry on any suit, action or proceeding, to collect * * * any money or moneys due, or which hereafter may become due * * * on said bonds * * *."

At the time of such assignment the said Chapin was and
34 for many years prior thereto had been an inhabitant, resident and citizen of the State of Connecticut, and was qualified and competent to bring suit on such "income bonds" in the United States District Court, either in that State or in Kansas; all of the defendants however being out of the jurisdiction of this Court in Connecticut, and none of them to be found nor doing business within that State and district, and he and deponent, as his counsel, being desirous of avoiding the unsatisfactory process of trying a

cause and conducting a litigation at and from a great distance determined upon the conveyance in trust aforesaid, so as to secure the benefits, advantages and convenience of a trial and hearing in this district, which will also accrue in equal degree to the benefit, advantage and convenience of the Atchison, Topeka and Santa Fe Railway Company, as will more fully hereinafter appear; and because the questions herein involved are not of local nature, but concern matters of general jurisprudence which have not been passed upon by the Courts of last resort, either in Connecticut or New York, but have been considered and finally determined by the United States Supreme Court in the case of the Northern Pacific Railway Company vs. Boyd, reported in the 228 U. S. Reports at page 482.

Immediately prior to this motion this defendant questioned the jurisdiction of this Court over it on the alleged ground that it was not "doing business" in this district, although it was made to appear from its own affidavits, aside from those of complainant, that it had had for many years in this district an office at which are held the meetings of its Board of Directors and its Executive Committee, and that at that office its assistant secretary, Mr. L. C. Deming,
35 had his office, whose duties amongst other things were to act as clerk of the Board of Directors and Executive Committee, and to retain in his custody duplicate sets of all agreements and contracts of defendant for the use and convenience of the Board of Directors and Executive Committee. It also appears from the record in that proceeding that of the defendant's fifteen directors, eight reside in this district, and of its eleven officers, three also reside here permanently.

The said motion was in all things denied by the Honorable United States Circuit Judge, Henry G. Ward, and an order to that effect has been or is about to be entered herein to that effect.

The proof in this suit will be wholly or substantially nothing but documentary in character, and none of them or their contents should be open to dispute, and their existence should be denied by neither defendant nor complainant; and no reason is apparent to deponent why proof thereof cannot be had with greater convenience to all concerned in this district than in Kansas; in fact it is deponent's belief that the matters here in dispute might and properly should be heard and determined upon an agreed statement of facts.

HOWARD O. WOOD.

Sworn to before me this 26" day of February, 1914.

MARY WALLACE,
Commissioner of Deeds, City of New York,
Residing in Bronx County.

Certificate filed in Bronx County, No. 36.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Mar. 13, 1914.

36 *Memorandum.*

United States District Court, Southern District of New York.

FRANCIS S. MALE, as Trustee,
against
ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY et al.

Memorandum.

WARD, *J.:*

The bill is filed to recover a judgment against the defendant the Atlantic and Pacific Railroad Company for the principal and interest of certain bonds payable only out of income issued by it and to declare that the defendants, the Atchison, Topeka and Santa Fe Railroad Company and Atchison, Topeka and Santa Fe Railway Company, are liable for the amount of the same and that the judgment shall be a lien on the property of the Railway Company. The ground is that all the assets of the Atlantic Company have gone, via the Railroad Company, into the Railway Company. The complainant seeks to bring the case within Northern Pacific v. Boyd, 228 U. S. 482. The only defendant which has been served is the Railway Company. It is a corporation created by the laws of the State of Kansas and contends that the Atlantic Company, being a corporation created by the laws of the United States, a suit on its bonds arises out of a law of the United States and this court has no jurisdiction because the Railway Company is not an inhabitant of this district, Judicial Code, Sec. 51.

37 The suit against the Railway Company is not upon the bonds but depends upon an equity arising out of fraud. However, if it were upon the bonds I think that the suit could not be maintained because even in the case of bonds of a corporation payable to bearer, the title to which has been transferred for the sole purpose of making the cause cognizable in a federal court, the suit must be dismissed under Sec. 37 of the Judicial Code. This was stated, though obiter, in the case of Consolidated Rubber Co. v. Ferguson, 183 F. R. 756.

The assignment to the complainant was obviously, if not concededly, made for the purpose of giving the court jurisdiction. Therefore if jurisdiction depends upon the citizenship of the parties, as the complainant contends, the court has no jurisdiction, as neither the complainant nor the defendant reside in this district. The bill will be dismissed without prejudice.

March 13, 1914.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Mar. 13, 1914.

38 *Order Dismissing Bill of Complaint.*

At a Stated Term of the District Court of the United States of America for the Southern District of New York, in the Second Judicial Circuit, Held at the United States Court Rooms, in the Borough of Manhattan, on the 21st Day of March, 1914.

Present: Hon. Henry G. Ward, Circuit Judge.

FRANCIS SHERWOOD MALE, as Trustee for Gilbert W. Chapin,
Plaintiff,
against
THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, ATCHISON, Topeka & Santa Fe Railroad Company, Atlantic & Pacific Railroad Company, and Boston Safe Deposit & Trust Company,
Defendants.

This cause came on to be further heard at this Term upon the motion of the defendant, The Atchison, Topeka & Santa Fe Railway Company, to set aside the service of the subpœna and to dismiss the bill of complaint herein on the ground that this Court has no jurisdiction of the person of the said defendant, and was argued by counsel; and thereupon, upon consideration thereof, it was

Ordered, adjudged and decreed that the bill be dismissed for want of jurisdiction without costs and without prejudice.

H. G. WARD,
Circuit Judge.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Mar. 23, 1914.

39 *Petition for Appeal and Order Allowing Appeal.*

United States District Court, Southern District of New York.

FRANCIS SHERWOOD MALE, as Trustee for Gilbert W. Chapin,
against
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ATCHISON, Topeka and Santa Fe Railroad Company, Atlantic and Pacific Railroad Company, and Boston Safe Deposit and Trust Company.

Your petitioner, Francis Sherwood Male, as trustee for Gilbert W. Chapin, complainant, herein respectfully represents that there is manifest error committed to the injury of him, the petitioner, by the final order, judgment and decree, dated the 21st day of March, 1914, and entered and pronounced in this cause on the 23rd day of March, 1914, in and by which said final order, judgment and decree, this court refused jurisdiction of the cause set forth in your petitioner's bill of complaint on the ground of want of jurisdiction of the same, on which said ground the court on the 23rd day of March,

1914, entered a final order, judgment and decree, dismissing the bill of complaint herein, and this suit for want of jurisdiction.

Wherefore, your petitioner, Francis Sherwood Male, as trustee for Gilbert W. Chapin, complainant, considering himself aggrieved, prays an order granting an appeal from said final decree denying the jurisdiction as aforesaid, to the Supreme Court of the United States and prays this Honorable Court that said appeal be allowed solely upon said question of jurisdiction, and that a transcript of
40 so much of the record, proceedings and papers upon which said order, judgment and decree was made, as may be necessary to present said question of jurisdiction on appeal, duly authenticated, may be sent to the Supreme Court of the United States.

Your petitioner herewith files and offers his bond in the penal sum of $500, and asks that the same be approved and that the appeal be allowed.

Dated, New York, 30 April, 1914.

WOOD, COOKE & SEITZ,
Solicitors for Complainant.

The complainant's bill having been dismissed by order, judgment and decree, of this court on the sole ground that the court had no jurisdiction of the suit; and the complainant praying an appeal to the Supreme Court of the United States on said question of jurisdiction, it is now

Ordered in open court that the appeal be allowed on that question only; and it is further

Ordered that so much of the record and proceedings and papers upon which said order, judgment and decree was made as may be necessary to present the said question of jurisdiction, and no more, be included in the record on appeal.

Dated, New York, 30 April, 1914.

H. G. WARD,
Circuit Judge.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Apr. 30, 1914.

41 *Assignments of Error.*

United States District Court, Southern District of New York.

FRANCIS SHERWOOD MALE, as Trustee for Gilbert W. Chapin,
against
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Atchison, Topeka and Santa Fe Railroad Company, Atlantic and Pacific Railroad Company, and Boston Safe Deposit and Trust Company.

Now comes the above named appellant, Francis Sherwood Male, as trustee for Gilbert W. Chapin, by Wood, Cooke & Seitz, his solicitors, and say that in the record and proceedings in this suit there is manifest error in this, to wit:

First. That the United States District Court, Southern District of New York, erred in holding and deciding that the said court had no jurisdiction to try and determine this suit and in rendering its decree dismissing the bill herein on that ground.

Second. That the said court erred in holding and deciding, if it did so hold and decide, that either the Atchison, Topeka and Santa Fe Railroad Company, the Atlantic and Pacific Railroad Company or the Boston Safe Deposit and Trust Company, either any or all of them were either necessary or indispensable parties to this suit.

Third. That the said court erred in holding and deciding, if it did so hold and decide, that this suit was improperly and collusively brought by the complainant in violation of Sections 37 (36 U. S. Statutes at large, page 1098) and 51 (36 U. S. Statutes at
42 large, page 1001), of the Judicial Code, in that the jurisdiction of this court for the Southern District of New York over this cause being dependent on diversity of citizenship of the plaintiff and defendant and the residence therein of one of the said parties, and that said defendant The Atchison, Topeka and Santa Fe Railway Company being a corporation created by and existing under the laws of the State of Kansas and being a citizen and resident of the State and District of Kansas, and not being a citizen or resident of the State of New York or of the Southern District thereof, Gilbert W. Chapin who is a citizen and resident of the State and District of Connecticut, and not a citizen or resident of the State of New York or of the Southern District thereof, and who is the real owner of the income bonds of the Atlantic and Pacific Railroad Company referred to in the bill of complaint herein, and therefore the real party plaintiff in interest, transferred and assigned said bonds to Francis Sherwood Male as trustee, the alleged plaintiff in this suit, who is alleged to be a citizen and resident of the State of New York and of the Southern District of New York, for the sole purpose of enabling suit on said bonds to be brought in this District Court for the Southern District of New York; and that the court erred in holding and deciding, if it did so hold and decide, that it was without jurisdiction of the person of the said defendant The Atchison, Topeka and Santa Fe Railway Company, in that it appears upon the face of the bill of complaint herein that the Atlantic and Pacific Railroad Company is a corporation created by an Act of Congress prior to the first day of January, 1872, and that in the bill of complaint herein not only is the defendant Atlantic and Pacific Railroad Company made a defendant jointly with this defendant, The Atchison, Topeka
43 and Santa Fe Railway Company, but the prayer for relief against this defendant, The Atchison, Topeka and Santa Fe Railway Company is predicated upon a judgment having been first obtained against the defendant Atlantic and Pacific Railroad Company, and that therefore this suit as to the defendant The Atchison, Topeka and Santa Fe Railway Company is a suit necessarily arising under the laws of the United States, and that the said defendant, The Atchison, Topeka and Santa Fe Railway Company is a corporation created by and existing under the laws of the State of

Kansas, and is a resident and inhabitant of the District of Kansas, and is not a resident or inhabitant of the State of New York, and that the defendant Atchison, Topeka and Santa Fe Railroad Company is a corporation organized under an act of the Legislature of the Territory of Kansas and is not a resident or inhabitant of the State of New York, and that the defendant, Boston Safe Deposit and Trust Company is a Banking Corporation organized under the laws of the State of Massachusetts and is not a resident or inhabitant of the State of New York.

Fourth. That the said court erred in holding and deciding that this complainant, your petitioner, was not qualified and competent to bring this suit in this court.

Fifth. That the court erred in holding and deciding that the defendant, The Atchison, Topeka and Santa Fe Railway Company, could be heard to object that its co-defendants were not within the jurisdiction of this court.

Sixth. That this court erred in holding and deciding that the defendant, The Atchison, Topeka and Santa Fe Railway Company, had not waived its right, if any, to object to the venue.

44 Wherefore, Francis Sherwood Male, as trustee for Gilbert W. Chapin, complainant and petitioner herein, prays that the order, judgment and decree of the United States District Court, Second Circuit, Southern District of New York, appealed from herein be reversed.

Dated, New York, April 29th, 1914.

WOOD, COOKE & SEITZ,
Solicitors and of Counsel for Complainant Appellant.
WILLIAM G. COOKE,
Counsel for Complainant Appellant.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Apr. 30, 1914.

45 *Certificate of Jurisdiction.*

United States District Court, Southern District of New York.

FRANCIS SHERWOOD MALE, as Trustee for Gilbert W. Chapin,
against
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Atchison, Topeka and Santa Fe Railroad Company, Atlantic and Pacific Railroad Company, and Boston Safe Deposit and Trust Company.

In this cause I hereby certify that the order, judgment or decree of dismissal herein made is based solely on the ground that the Atlantic and Pacific Railroad Company, one of the defendant- herein, being a corporation created by the laws of the United States, a suit on its bonds arises out of a law of the United States and that this court has no jurisdiction thereof because the Atchison, Topeka and Santa Fe Railway Company, the only defendant served herein, is not an inhabitant of the Southern District of New York; and on the fur-

ther ground that the title to the bonds involved in this suit was transferred for the sole purpose of making this cause cognizable in a federal court and for the purpose of giving the United States District Court in and for the Southern District of New York jurisdiction thereof; and on the further ground that neither the complainant nor the defendant, the Atchison, Topeka and Santa Fe Railway Company, resides in this district. And acting also independently of the motion made herein by the Atchison, Topeka and Santa Fe
46 Railway Company, and on the court's own motion, this suit is dismissed only for the reasons above stated.

This certificate is made conformably to the act of Congress in such case made and provided, and the opinion filed herein is made a part of the record and will be certified and sent up as a part of the proceedings together with this certificate.

Dated, this 30 day of April, 1914.

H. G. WARD,
Circuit Judge, Holding the United States District Court for the Southern District of New York.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Apr. 30, 1914.

47 American Surety Company of New York.

Capital and Surplus Over $6,000,000.

Company's Office Building, 100 Broadway, New York.

United States District Court for the Southern District of New York.

FRANCIS SHERWOOD MALE, as Trustee for Gilbert W. Chapin,
Plaintiff,
against
THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Impleaded with Atchison, Topeka & Santa Fe Railroad Company, Atlantic & Pacific Railroad Company, and Boston Safe Deposit & Trust Company, Defendants.

Know all men by these presents, that we, Francis Sherwood Male, of 571 Park Avenue, Borough of Manhattan, City of New York, as Trustee for Gilbert W. Chapin, and as Principal herein, and the American Surety Company of New York, having an office and principal place of business at No. 100 Broadway, Borough of Manhattan, City of New York, as Surety, are held and firmly bound unto The Atchison, Topeka & Santa Fe Railway Company, in the full and just sum of Five Hundred Dollars ($500.00), to be paid to the said defendant, The Atchison, Topeka & Santa Fe Railway Company, its successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 28th day of April, 1914.

Whereas, lately at a term of the District Court of the United States, for the Southern District of New York, in a suit pending in said Court, between the said Francis Sherwood Male, as Trustee for Gilbert W. Chapin, plaintiff, and The Atchison, Topeka & Santa Fe Railway Company, impleaded with Atchison, Topeka & Santa Fe Railroad Company, Atlantic & Pacific Railroad Company and Boston Safe Deposit & Trust Company, defendants, a decree was rendered and entered herein on or about the 23rd day of March, 1914, against said Francis Sherwood Male, as Trustee, as aforesaid, and he having prosecuted an appeal to the Supreme Court of the United States to reverse such decree and a citation directed to the said Atchison, Topeka & Santa Fe Railway Company having issued, citing and admonishing it to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington, on the — day of —— next.

48 Now, the condition of the above obligation is such, That if the said Francis Sherwood Male, as Trustee of Gilbert W. Chapin, shall prosecute his appeal to effect and answer all damages and costs if he shall fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of

—— ——.

FRANCIS SHERWOOD MALE.
AMERICAN SURETY COMPANY OF NEW YORK,
[L. S.] By MARSHALL L. BROWER,
Resident Vice-President.

Attest:
GEORGE R. GROSBY,
Resident Assistant Sec't'y.

49 STATE OF NEW YORK,
County of New York, ss:

On this Apr. 29, 1914, before me personally appeared Marshall L. Brower, Resident Vice-President of the American Surety Company of New York, to me known, who, being by me duly sworn, did depose and say: that he resides in the City of New York, N. Y.; that he is the Resident Vice President of the American Surety Company of New York, the Corporation described in and which executed the above instrument; that he knows the corporate seal of said Corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Trustees of said Corporation, and that he signed his name thereto by like order; and that the liabilities of said Corporation do not exceed its assets as ascertained in the manner provided by law. And the said Marshall L. Brower further said that he is acquainted with George R. Crosby, and knows him to be one of the Resident Assistant Secretaries of said corporation; that the signature of said George R. Crosby subscribed to the said instrument is in the genuine handwriting of the said George R. Crosby, and was thereto subscribed by the like order of the said

Board of Trustees, and in the presence of him the said Marshall L. Brower, Resident Vice President.

[L. S.] E. A. FARRELL,
Notary Public, New York County, No. 1058.
Register's Office, New York County, No. 5015.
Certificate Filed in All Counties.

50 Approved:

H. G. WARD, *U. S. J.*

April 30, 1914.

U. S. District Court, S. D. of N. Y. Filed April 30, 1914.

51 UNITED STATES OF AMERICA, *ss:*

[Seal District Court of the United States, Southern District of New York.]

To The Atchison, Topeka & Santa Fe Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, within thirty days from the date hereof, pursuant to an appeal filed herein on the 30th day of April, 1914, in the Clerk's Office of the United States District Court, Southern District of New York, wherein Francis Sherwood Male as Trustee for Gilbert W. Chapin, is complainant-appellant, and you are defendant-appellee, to show cause if any there be, why the judgment rendered against the appellant as in said appeal and the certificate of the court mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Hon. Edward D[illegible]lass White, Chief Justice of the United States, this 6th day of July in the year of Our Lord one thousand nine hundred and fourteen.

H. G. WARD, *U. S. C. J.*

52 [Endorsed:] E. 11/43. District Court of the United States for the Southern District of New York. Francis Sherwood Male, as Trustee for Gilbert W. Chapin, vs. The Atchison, Topeka & Santa Fe Railway Company et al. Original, Eq. 11-43. Citation. Wood, Cooke & Seitz, 63 Wall Street, New York City, Solicitors for Complainant-Appellant. Due service of a copy of the within is hereby admitted. Dated, New York, — —, 19—. Copy Received July 7, 1914. Walker D. Hines, Attorney for Sol., appearing specially, etc. Filed July 9, 1914. U. S. District Court, S. D. of N. Y.

53 *Certificate.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

FRANCIS SHERWOOD MALE, as Trustee for Gilbert W. Chapin, Complainant-Appellant,
vs.
THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY et al., Defendant-Appellee.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 4th day of August, in the year of our Lord one thousand nine hundred and Fourteen and of the Independence of the said United States the one hundred and thirty-ninth.

[Seal District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR., *Clerk.*

Clerk's Fee for Certification, $22.85.

54 [Endorsed:] United States Supreme Court. Francis Sherwood Male, as Trustee for Gilbert W. Chapin, Compl't-Appellant, vs. The Atchison, Topeka & Santa Fe Railway Company et al., Def'ts-Appellees. Transcript of Record. Appeal from the District Court of the United States for the Southern District of New York.

Endorsed on cover: File No. 24,332. S. New York D. C. U. S. Term No. 220. Francis Sherwood Male, as Trustee for Gilbert W. Chapin, appellant, vs. The Atchison, Topeka & Santa Fe Railway Company. Filed August 6, 1914. File No. 24,332.